

WASHINGTON STATE BAR ASSOCIATION

Court Rules and Procedures Committee

Meeting Minutes **March 25, 2024**

Members Present: Michael Chait, Chair, Charles Adams, Magda Baker, Bill Elsinger, Jessica Fleming, Loni Hinton, James Horne, Martin Mooney Jr., Christine Olson, Kelly Oshiro, Scott Prichard, Matthew Stoloff, and Andrew Van Winkle.

Members Excused: Matthew Antush, Stephanie Dikeakos, Brian Flaherty, Tamara Gaffney, John Hogland, Eric Lindberg, Michelle Maley, Matthew O’Laughlin, Laurel Smith, Geoffrey Wickes, and Amanda Williamson.

Also Attending: Judge Blaine Gibson, Nicole Gustine (WSBA Assistant General Counsel), Emily Crane (WSBA Paralegal), David Ward (AOC Liaison).

The meeting was called to order at 9:33 a.m. once a quorum was established.

1. Approval of Minutes

A motion was made and seconded to approve the minutes of the February 12 and 13, 2024, meetings. The motion passed by unanimous consent.

2. Update on BOG recommendation

BOG approved Committee comments regarding proposed changes to CR 28 and CR 30.

3. Subcommittee Reports

- Mandatory Arbitration Rules: SCCAR. Met to go over first section. Subcommittee Chair would like to put out a call for any members with arbitration experience to consider joining this subcommittee.
- Civil Rules: No updates.
- Civil Rules for Courts of Limited Jurisdiction: No updates.
- Subcommittee X: No updates.

The meeting adjourned at 9:39 a.m. *The next meeting is scheduled for April 29, 2024.*

May 6, 2024

Report of the Civil Rules Subcommittee

On Monday, May 6, 2024, the Civil Rules Subcommittee held its subcommittee meeting to discuss a few proposals and to make decisions on the next steps ahead on a proposed revision to the terminology of “master” and “special master” in CR 53 and the requirement that such masters or special masters also be current members of the Washington State Bar Association. The second request made to the Civil Rules Subcommittee was to investigate and make proposals with regard to the language of CR 35 (Physical and Mental Examinations of Persons) to make the Rule more effective with regard to Mental Examinations that are no longer taking place due to the language of CR 35(a)(2). The suggestion was made that the Civil Rules Subcommittee should consider a revision to CR 35 that would bring it more in conformity with the language of Fed. R. Civ. P. 35, the parallel federal court civil rule.

Proposed Revision to CR 53 [Reserved] and CR 53.3

The proposal to consider amendments to Rule 53.3 and Reserved Rule 53 come from former Washington Supreme Court Justice Helen Halpert. In 2023, Justice Halpert suggested consideration of changes to the outdated terms “Master” and “Special Master” contained in CR 53.3 and in the Title to Reserved Court Rule 53. Justice Halper also questioned whether such “Masters” and “Special Masters” need to be current members of the Washington State Bar Association to serve in these capacities.

While Justice Halpert’s sense that the terms “Master” and “Special Master” may be outdated may or may not be true, these terms appear to have been in use for many years in the context of discovery masters. If anything, the terms may be revised to “Discovery Master” or “Special Discovery Master” to clarify their true roles in the process of resolving discovery disputes between contentious lawyers, but we will examine that issue and make a recommendation to the full WSBA Court Rules and Procedures Committee.

With regard to the issue of whether such “Discovery Masters” or “Special Discovery Masters” need to be current members of the Washington State Bar Association as specified in CR 53.3 (b), the Subcommittee will examine the issue and make a recommendation to the full WSBA Court Rules and Procedures Committee in this regard. Because the task of being a “Discovery Master” or “Special Discovery Master” requires some specialized knowledge about discovery under the Washington Superior Court Civil Rules, it does seem to require some special qualifications to serve in these positions. It may be, however, that “Discovery Masters” or “Special Discovery Masters” need not be current WSBA members, but can also include retired or semi-retired WSBA members.

Although Reserved CR 53 merely includes the heading “Masters,” it seems reasonable that a change to “Discovery Masters” or similar terminology can also be made to that Reserved Civil Rule, if necessary.

Consideration of Revisions to CR 35 (Physical and Mental Examinations of Persons)

Over the past few years, reports have been made increasingly as to the frustration of civil litigators, superior court judges, and medical professionals as to the non-workability of CR 35 particularly with respect to Mental or Psychological Examinations of parties. The particular issue appears to arise because CR 35(a)(2) provides: "The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination." This seemingly guaranteed right to have a representative of the examined party present during the examination allegedly runs afoul of the professional duties or obligations of Psychiatrists, Psychologists, or other Mental Health Experts to preclude the attendance of anyone other than the patient being examined for two principle purposes: (1) maintenance of the right of privacy of the patient being examined; and (2) the professional requirement that no one other than the patient may be present to influence or interfere with the mental or psychological examination.

The WSBA Court Rules and Procedures Committee has received numerous complaints and suggestions from practitioners and superior court judges that CR 35 no longer works to permit primarily defendants from conducting CR 35 Mental or Psychological Examinations of parties because the apparent guarantee of CR 35(a)(2) to permit a representative of the party to be present conflicts with the professional duties and obligations of the health care professionals to conduct such interviews and examinations outside the presence of any outside influences besides the actual person being evaluated.

A suggestion has been made to the WSBA Court Rules and Procedures Committee that the Board of Governors and/or other authorities would like the Committee to consider and possibly draft a new version of CR 35 that conforms more closely to the parallel federal version of Rule 35 contained in Fed. R. Civ. P. 35. The principal difference between the two rules being that the federal counterpart contains no provision requiring the presence of a representative of the person being examined. An preliminary examination of case law from federal courts appears to demonstrate inconsistent results as to whether a litigant will or will not be permitted to have a representative present under the federal rule.

The Civil Rules Subcommittee feels such a change in Rule 35 would create potential conflicts with vested interests that this Subcommittee and/or the WSBA Court Rules and Procedures Committee would not be in the position to dictate by rule change.

In order to investigate a potential change to CR 35, the Civil Rules Subcommittee believes a measured and calculated approach should be undertaken to investigate the true need for such a rule change; to investigate whether there is, in fact, a professional conflict that automatically defeats the implementation of CR 35 with regard to Mental or Psychological Examinations; and whether less dramatic changes can be effectuated that would once again permit the rule to be effective.

To the end, the Civil Rules Subcommittee intends to do the following:

(1) Conduct investigation into the history of the implementation of CR 35(a)(2) to determine why the rule was created in its present language and whether a change can or should be implemented. Eric Lindberg has volunteered to dig into the history of CR 35, why Fed. R. Civ. P. 35 does not have a similar guarantee of the presence of a representative at physical or mental examinations, and perhaps the background of the adoption of similar provisions to CR 35(a)(2) in other states.

(2) Contact and Seek Input from the Various Stakeholders and Interested Parties as to their positions with regard to the present version of CR 35, their positions on retention or abandonment of the right to have a representative present during the examination, and whether there are alternatives that may permit more parties to preserve their interests while permitting Mental or Psychological Examinations of parties to take place. To that end, the Civil Rules Subcommittee intends to contact the following and request their input:

- (a) Representatives of WSAJ – John Hoglund
- (b) Representatives of WDTL – Jim Horne
- (c) Psychiatrists Organization/Washington Medical Association – John Hoglund
- (d) Psychologist Association/Mental Health Counselors – Scott Pritchard
- (e) Superior Court Judges Association – Jim Horne
- (f) Section Heads of Other WSBA Practice Groups such as Family Law Practitioners, Estate Planning and Probate Lawyers, etc. – Geoff Wickes

(3) The Plan would be to send our inquiries for input by May 10, 2024, with responses expected back no later than June 15, 2024.

(4) At that stage, the Civil Rules Subcommittee would gather again to evaluate the information obtained and make a recommendation as to whether or not to proceed with drafting a new version of CR 35 in conformity with the language of Fed. R. Civ. P. 35, i.e., without the right to have representatives present during examinations.

(5) If a decision is made to move forward, we would submit our suggested revisions to CR 35 to the Court Rules and Procedures Committee for amendment or adoption to then forward it on to the Board of Governors for consideration and possibly to forward it on to the Washington Supreme Court for further consideration.

The Civil Rules Subcommittee Meeting was thereupon adjourned.

Rule 35. Physical and Mental Examinations

Primary tabs

(a) ORDER FOR AN EXAMINATION.

(1) ***In General.*** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) ***Motion and Notice; Contents of the Order.*** The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) EXAMINER'S REPORT.

(1) ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) ***Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(5) ***Failure to Deliver a Report.*** The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) Scope. This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

NOTES

(As amended Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Pub. L. 100–690, title VII, §7047(b), Nov. 18, 1988, 102 Stat. 4401; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz.Rev.Code Ann. (Struckmeyer, 1928) §4468; Mich.Court Rules Ann. (Searl, 1933) Rule 41, §2; 2 N.J.Comp.Stat. (1910), N.Y.C.P.A. (1937) §306; 1 S.D.Comp.Laws (1929) §2716A; 3 Wash.Rev.Stat.Ann. (Remington, 1932) §1230–1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch. 491–F1. See McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in Iowa*, 20 Ia.L.Rev. 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon v. Manhattan Railway Co.*, 142 N.Y. 298, 37 N.E. 113 (1894), and *McGovern v. Hope*, 63 N.J.L. 76, 42 Atl. 830 (1899). In *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co. v. Stetson*, 177 U.S. 172 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, ch. 651, U.S.C., Title 28, §723b [see 2072] (Rules in actions at law; Supreme Court authorized to make) and 723c [see 2072] (Union of equity and action at law rules; power of Supreme Court).

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

Subdivision (a). Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to “produce” the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940). Provisions similar to the amendment have been adopted in at least 10 States: Calif.Code Civ.Proc. §2032; Ida.R.Civ.P. 35; Ill.S-H Ann. c. 110A, §215; Md.R.P. 420; Mich.Gen. Ct.R. 311; Minn.R.Civ.P. 35; Mo.Vern.Ann.R.Civ.P. 60.01; N.Dak.R.Civ.P. 35; N.Y.C.P.L. §3121; Wyo.R.Civ.P. 35.

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be “in controversy” and “good cause” must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

Subdivision (b)(1). This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physician's report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See La.Stat.Ann., Civ.Proc. art. 1495 (1960); Utah R.Civ.P.35(c).

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

Subdivision (b)(3). This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 *Moore's Federal Practice* 35.06, n.1 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* §823, n. 22 (Wright ed. 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. *Sher v. De Haven*, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied* 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, e.g., *Galloway v. National Dairy Products Corp.*, 24 F.R.D. 362 (E.D.Pa. 1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. E.g., *Leszynski v. Russ*, 29 F.R.D. 10, 12 (D.Md. 1961) and cases cited. The question was recently given full consideration in *Buffington v. Wood*, 351 F.2d 292 (3d Cir. 1965), holding that Rule 35(b) is not preemptive.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The revision authorizes the court to require physical or mental examinations conducted by any person who is suitably licensed or certified.

The rule was revised in 1988 by Congressional enactment to authorize mental examinations by licensed clinical psychologists. This revision extends that amendment to include other certified or licensed professionals, such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute.

The requirement that the examiner be *suitably* licensed or certified is a new requirement. The court is thus expressly authorized to assess the credentials of the examiner to assure that no person is subjected to a court-ordered examination by an examiner whose testimony would be of such limited value that it would be unjust to require the person to undergo the invasion of privacy associated with the examination. This authority is not wholly new, for under the former rule, the court retained discretion to refuse to order an examination, or to restrict an examination. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §2234 (1986 Supp.). The revision is intended to encourage the exercise of this discretion, especially with respect to examinations by persons having narrow qualifications.

The court's responsibility to determine the suitability of the examiner's qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony calls for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

AMENDMENT BY PUBLIC LAW

1988 —Subd. (a). Pub. L. 100-690, §7047(b)(1), substituted “physical examination by a physician, or mental examination by a physician or psychologist” for “physical or mental examination by a physician”.

Subd. (b). Pub. L. 100-690, §7047(b)(2), inserted “or psychologist” in heading, in two places in par. (1), and in two places in par. (3).

Subd. (c). Pub. L. 100-690, §7047(b)(3), added subd. (c).

CR 35 PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Examination.

(1) **Order for Examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(2) **Representative at Examination.** The party being examined may have a representative present at the examination, who may observe but not interfere with or obstruct the examination.

(3) **Recording of Examination.** Unless otherwise ordered by the court, the party being examined or that party's representative may make an audiotape recording of the examination, which shall be made in an unobtrusive manner. A videotape recording of the examination may be made on agreement of the parties or by order of the court.

(b) **Report of Examining Physician or Psychologist.** The party causing the examination to be made shall deliver to the party or person examined a copy of a detailed written report of the examining physician or psychologist setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition, regardless of whether the examining physician or psychologist will be called to testify at trial. The report shall be delivered within 45 days of the examination and in no event less than 30 days prior to trial. These deadlines may be altered by agreement of the parties or by order of the court. If a physician or psychologist fails or refuses to make a report in compliance herewith the court shall exclude the examiner's testimony if offered at the trial, unless good cause for noncompliance is shown.

(c) **Examination by Agreement.** Subsections (a) (2) and (3) and (b) apply to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. [Adopted effective July 1, 1967; Amended effective July 1, 1972; September 17, 1993; September 1, 2001.]

CR 53 Proposed Revision

From: Benway, Jennifer <Jennifer.Benway@courts.wa.gov>
Sent: Thursday, October 19, 2023 3:37 PM
To: Kyla Reynolds <Kylaj@wsba.org>
Subject: RE: [External]WSBA Rules Committee Question

Thank you for the info! It's from Judge Helen Halpert (Ret.) – CR 53.5 and reserved rule CR 53: Both of these rules use the outdated terms master and/or special master. I suggest this language should be updated to reflect modern, more appropriate, terminology. There is also some confusion as to whether the person filling this role needs to be an active member of the bar or if inactive status is sufficient to meet the requirements of the rule. See 53.3(b)

Good timing for the CR review, I think? I don't think she's going to submit it – I guess maybe I could do so on her behalf? Thank you again!

From: Kyla Reynolds [<mailto:Kylaj@wsba.org>]
Sent: Thursday, October 19, 2023 2:15 PM
To: Benway, Jennifer <Jennifer.Benway@courts.wa.gov>
Subject: RE: [External]WSBA Rules Committee Question

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Hi J! Yes, the Committee will often times review suggestions to rules or answer inquires that folks e-mail or mail to them. Usually, they look into it if it's a rule that the Committee has in its cycle of review. Subcommittee X is who is responsible for these out-of-cycle requests. On a few occasions, we've received questions about local Superior Court's rules and have referred folks to contacts at those courts.

Do you know what rule this is in reference to? Even if its not in the Committee's cycle of review, they may have suggestions for who the appropriate resource is. Feel free to direct the retired judge to e-mail suggestions to WSBACourtRules@wsba.org. Hope this is helpful!



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From: Benway, Jennifer <Jennifer.Benway@courts.wa.gov>
Sent: Thursday, October 19, 2023 12:41 PM
To: Kyla Reynolds <kylaj@wsba.org>
Subject: [External]WSBA Rules Committee Question

Hi Kyla,

In my capacity as WSSC Rules Committee staff, I've been approached by a retired judge who has an idea for a rule change but who doesn't seem to want to make the proposal. I've provided resources, but she keeps reaching out to the justices. Is this something I could somehow propose to the Rules Committee to look into? To be clear, there's no actual proposal, just a suggestion, and not one that I am in a position to promote. I wondered if you had any thoughts about how I might proceed.

Thank you!

J Benway

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CR 53.3 APPOINTMENT OF MASTERS IN DISCOVERY MATTERS

(a) **Appointment.** The court in which any action is pending may appoint a special master either to preside at depositions or to adjudicate discovery disputes, or both. Such appointment may be made, for good cause shown, upon the request of any party in pending litigation or upon the court's own motion.

(b) **Qualifications.** The master shall be a lawyer admitted to practice in the state of Washington.

(c) **Compensation.** The compensation of the master shall be fixed by the court. Payment of the master's compensation shall be charged to such of the parties or paid out of such other available funds as the court shall direct, but in determining payment of compensation the court shall take into account the relative financial resources of the parties and such other factors as the court deems appropriate.

(d) **Powers.** The order of reference to the master may specify the duties of the master. It may direct that the master preside at depositions and make rulings on issues arising at the depositions. It may direct the master to hear and report to the court on unresolved discovery disputes and to make recommendations as to the resolution of such disputes, as to the imposition of terms or sanctions to be assessed against any party, and as to which party or parties shall bear the costs of the master. If directed by the court, the master shall prepare a report upon the matters submitted to the master by the order of reference. A party may request that the report be sealed pursuant to rule 26(c). The report with the rulings and recommendations of the master shall be reviewed by the court and may be adopted or revised as the court deems just.

[Adopted effective July 1, 1967; Amended effective September 17, 1993.]

Are Attorneys Allowed to Attend an Independent Medical Examination?

The U.S. District Court for the Southern District of Texas (“SDTX”) recently addressed the question of whether a plaintiff’s attorney is permitted to attend a Federal Rule of Civil Procedure (F.R.C.P) 35 independent medical examination (IME) with his client in a personal injury matter. *See* . The Court held that the injured Plaintiff was not allowed to have his attorney present in the examination room as he had not demonstrated that there were “special circumstances” that warranted allowing the attorney to be present.

The Court noted that a number of other Federal Courts have refused to allow a lawyer to attend his client’s medical examination because allowing a third person to be present at a medical examination “would subvert the purpose of *Rule 35*, which is to put both the plaintiff and defendant on an equal footing with regard to evaluating the plaintiff’s medical status. In other words – where one party has been examined by his or her doctors outside the presence of others... – the other party should be given the same equal opportunity.” *See*). The court reasoned that the presence of an attorney has a high probability of causing adverse effects on the examination, carries the possibility of making the attorney a witness, and may result in disruption of the examination. The court noted that an attorney’s presence for moral support and guarding against improper conduct on the part of the physician are not “special circumstances” justifying the presence of plaintiff’s counsel at the examination.

The U.S. District Court for the Southern District of New York (SDNY) has a similar stance on not allowing attorneys to be present for an IME. *See* . SDNY Judges have held that the presence of an attorney at the examination frustrates its purpose by impairing its effectiveness and rendering it adversarial. *See* . Moreover, when an attorney who is present at an examination becomes a potential witness in the client’s trial it naturally raises conflict of interest problems.

While Federal Courts in New York and Texas are firmly against allowing an attorney to be present at an IME, state courts sitting in New York have held that Plaintiffs are entitled to have a representative present at their physical examinations as long as the representative does not interfere with the examination conducted by defendants’ designated physician and does not prevent defendants’ physician from conducting a meaningful examination.” *See*

IME Expert Discovery under Federal Rule 35: Privileges and Perils

Daniel R. Michelmore*

ABSTRACT

Federal Rule 26 privileges each side to either foreclose discovery into their own respective experts by designating them as consulting experts or to narrowly restrict their discovery by designating them as testifying experts. While there is considerable confusion, many courts have applied this privilege framework to discovery issues involving independent medical examiner experts.

But there is another rule, Rule 35, which specifically applies to examiner experts. Once invoked, Rule 35 nullifies any privileges under Rule 26. Under Rule 35, plaintiffs examined by motion or agreement may obtain unfettered discovery from the defense examiner free and clear of the consultative and testifying expert privileges, including draft reports and communications with defense counsel. In seeking this information, however, plaintiffs automatically waive all privileges to their own examiners.

While seemingly equitable, this rule in operation sanctions plaintiffs to wield privilege both as a sword and a shield and, by making plaintiffs the sole arbiter of privilege, usurps the power of the defendant.

Plaintiffs can shop for examiners until they find the opinion they want and can protect any unfavorable opinions from discovery by simply never seeking discovery from the defendant's examiner, thereby maintaining privilege for both. Defendants, on the other hand, are limited to only one examiner, and their assertion of privilege is subject

* Mr. Michelmore is a member in Jackson Kelly PLLC's Pittsburgh office, where his practice focuses on civil litigation in state and federal court at both the trial and appellate levels.

to plaintiffs' blanket override. Rule 35, then, in effect turns the doctrine of waiver on its head, granting plaintiffs the power to waive not only their own privilege but defendants' as well.

In an ideal world, the solution would be re-writing the rule. In the real world, the only available solution is awareness of the perils of Rule 35 and a consequent judicious caution when dealing with independent medical examiners.

INTRODUCTION

The independent medical examination (“IME”) is an essential tool in federal personal injury litigation, providing the defense with an opportunity to have plaintiffs examined by a physician to confirm or refute their alleged injuries, their cause, and the opinions of plaintiffs’ own treating physicians. Ideally, defense counsel can retain an examining physician whose judgment they trust and who has significant experience as an expert witness. However, plaintiffs often assert injuries that defense counsel have not previously encountered and that require retaining new and unfamiliar physicians specializing in those areas. In those instances where that new examiner reaches opinions supporting the defendant and will present well as a witness, the defendant uneventfully designates the examiner as a testifying expert and has the examiner prepare a report. But where the defendant’s examiner confirms plaintiffs’ injuries, or makes for a lackluster witness, the defendant may not want either the examiner’s testimony or report.¹ In that case, can the defendant simply designate the examining

¹ *Waggoner v. Ohio Cent. R.R.*, 242 F.R.D. 413, 414 (S.D. Ohio 2007) (“Often, the results of the examination simply confirm what the injured party’s doctors have reported, and the Rule 35 examiner therefore serves only as a consultant to the defending party and not as a trial witness.”).

physician as a consulting expert and thereby shield the examiner's opinions from discovery?

Most courts and commentators confronting this issue have decided that the answer lies somewhere in the murky interplay between Federal Rule of Civil Procedure 26(a)(2)'s testifying expert discovery limitations, Rule 26(b)(4)(D)'s prohibition of discovery as to non-testifying consultative experts, and Rule 35's provisions governing IMEs. In weighing these competing considerations, these authorities have come to wildly varying conclusions, casting uncertainty where litigants need clarity. According to Wright and Miller, absent "exceptional circumstances," *nothing but* the consulting examiner's Rule 35 IME report is discoverable due to Rule 26(b)(4)(D)'s consultative privilege.² Though some courts have followed that construction,³ others have concluded nearly the opposite, holding that *most everything* is discoverable from the consulting examiner *except for* communications with counsel and draft reports, which are protected by Rule 26(a)(2)'s testifying expert privilege.⁴

2 See 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2237 (2d ed.).

3 See *Castillo v. W. Beef, Inc.*, 04 CV 4967 (NGG) (ETB), 2005 WL 3501880, at *2 (E.D.N.Y. Dec. 21, 2005) ("Further, Rule 26(b)(4)(B) explicitly states that a non-testifying consultative expert may be subject to depositions and interrogatories 'as provided in Rule 35(b)'"); *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 632 (D. Kan. 1999) ("Plaintiff may also discover 'through interrogatories or by deposition' facts known or opinions held by [defendant's consulting examiner], if defendant chooses not to rely upon his testimony at trial.").

4 See *Harrison v. Newman*, CV 2:16-2919-RMG, 2017 WL 4277632, at *2 (D.S.C. Sept. 26, 2017) (compelling production of consulting examiner's notes); *Nunn v. Show Fountains, Inc.*, CIV-05-1161, 2006 WL 8436337, at *4 (W.D. Okla. Dec. 4, 2006); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1192 (11th Cir. 2013) (holding that testifying expert's notes and communications with non-attorneys are discoverable); *Bryant v. Dillon Real Estate Co.*, 18-CV-00479-PAB-MEH, 2019 WL 3935174 (D.

Each of these interpretations unnecessarily complicates an essentially straightforward matter. A review of the language and purpose of Rule 35, contrasted with that of Rule 26, demonstrates that once requested by plaintiffs, *no* privileges protect or limit discovery of either side’s examiners, whether past, present, or future, testifying or consulting. But while the rule may appear evenhanded on its face, it overwhelmingly benefits plaintiffs in practice. Rule 35 comes into effect only when plaintiffs make the affirmative act of requesting the defendant’s IME materials, which in turn triggers the rule’s reciprocal waiver of privileges for both parties.⁵ Because the defendant’s IME of plaintiffs is an invasion of their privacy by a physician they did not select, the defendant can only do it once.⁶ Plaintiffs, on the other hand, can select as many physicians as they desire on as many occasions as they deem necessary.⁷ By making plaintiffs’ request the sole mechanism for triggering disclosure and waiving privilege for both sides, Rule 35 therefore allows plaintiffs to shop for multiple IMEs and only disclose the ones they want by simply never requesting the defendant’s IME materials. On other hand, the rule gives the defendant just a single IME and no say or control in its disclosure.

Colo. Aug. 20, 2019) (finding the examiner’s drafts not discoverable because he was a testifying expert); *E.N. v. Susquehanna Twp. Sch. Dist.*, 1:09-CV-1727, 2011 WL 3163186, at *3 (M.D. Pa. July 26, 2011) (“*E.N. IP*”) (holding that Rule 35 required defendant to produce an IME report prepared by a consulting examiner which defendant characterized as a “draft” because Rule 26(b)(4)(D) only applied to testifying experts).

5 FED. R. CIV. P. 35(b)(4).

6 *Tomlin v. Holecck*, 150 F.R.D. 628, 632–33 (D. Minn. 1993).

7 *Id.*

I. EXPERT DISCOVERY AND ITS LIMITS UNDER THE FEDERAL RULES**A. Testifying and Consulting Expert Privileges under Rule 26**

Rule 26(a)(2) of the Federal Rules of Civil Procedure governs testifying experts and requires that they produce a report and, during the expert discovery period, be subject to deposition regarding their opinions and the facts or data they considered in forming those opinions. Under subsections (b)(4)(B) and (C), draft reports by testifying experts are absolutely protected from discovery. Their communications with counsel are similarly protected except for those communications in which the attorney provides facts or data that the testifying experts considered or assumptions they relied on in forming their opinions.⁸

Rule 26(b)(4)(D) governs consulting experts and provides that “[o]rdinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert . . . who is not expected to be called as a witness at trial.”⁹ Since consulting experts’ ultimate opinions are not discoverable, none of the facts, data, or assumptions communicated to them by counsel, or reports or draft reports prepared containing those opinions, are discoverable either. Rule 26(b)(4)(D)’s consultative privilege protecting facts known or opinions held by consulting experts from discovery is, however, subject to the exception “provided in Rule 35(b).”¹⁰

8 FED. R. CIV. P. 26(b)(4)(B)–(C).

9 FED. R. CIV. P. 26(b)(4)(D).

10 In addition to Rule 35 IME materials, the consultative privilege is subject to another exception in cases of “exceptional circumstances.” FED. R. CIV. P. 26(b)(4)(D)(ii). As this article is concerned solely with IME materials, this second exception will not be addressed herein.

B. The Rule 35 IME Expert Exception

Rule 35 governs IMEs, and subdivision (b) provides that the defendant “must, on request, deliver to the [plaintiff] a copy of the examiner’s report.”¹¹ The defense examiner’s report “must set out in detail the examiner’s findings, including diagnoses, conclusions, and the results of any tests.”¹² If the defendant does not provide the IME report to the plaintiff after it is requested, “the court may exclude the examiner’s testimony at trial.”¹³ Finally, “[b]y requesting and obtaining the examiner’s report, or by deposing the examiner, the [plaintiff] . . . waives any privilege it may have—in that action or in any other action involving the same controversy—concerning testimony about all examinations of the same condition.”¹⁴ Crucially, Rule 35 makes no distinction between testifying and consulting examiners.¹⁵ Thus, unlike the ordinary consulting expert, the consulting IME examiner’s opinions are subject to discovery.

The federal discovery rules treat consulting examiners differently than ordinary consulting experts because they serve, or at least were designed to serve, a different purpose. The purpose of Rule 26(b)(4) is to protect attorney work product by allowing counsel to freely confer with consulting experts on key issues in the case without fear their opponent will use

11 FED. R. CIV. P. 35(b)(1).

12 FED. R. CIV. P. 35(b)(2).

13 FED. R. CIV. P. 35(b)(5).

14 FED. R. CIV. P. 35(b)(4).

15 *Delgado v. GGNSC Grand Island Lakeview LLC*, 4:15CV3124, 2016 WL 5339535, at *2 (D. Neb. Sept. 23, 2016) (“[Rule 35] does not distinguish between examinations by testifying or non-testifying experts . . .”).

that expert against them¹⁶ or piggyback off their work and expense.¹⁷ Rule 35 is designed to give both sides equal access to the true facts of plaintiff’s physical condition so as to facilitate the “just, speedy, and inexpensive determination” of the case.¹⁸ Rule 35 thus does not care if a party’s consulting examiner is used against it; in fact, it implicitly encourages it. The opinions of the examiners on both sides, regardless of whether they hurt or help the side employing them, are discoverable¹⁹ because marked differences between those opinions sharpen the issues while any agreement increases the potential for expeditious settlement.²⁰

16 See FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment (“[This amendment] is designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.”); see also *Zvolensky v. Ametek, Inc.*, 142 F.3d 438, at *2 (6th Cir.1998); *Precision of New Hampton v. Tri Component Prods. Corp.*, No. C12-2020, 2013 U.S. Dist. LEXIS 79847, at *7 (N.D. Iowa June 5, 2013); *Kingdom Auth. v. City of Rockford*, No. 09 C 50240, 2011 WL 245585, at *3 (N.D. Ill. Jan. 26, 2011); *Interface Grp.-Nev. v. Men’s Apparel Guild*, 2:04-CV-0330-JCM-GWF, 2006 WL 8441913, at *2 (D. Nev. Jan. 3, 2006).

17 See, e.g., *Plymovent Corp. v. Air Tech. Sols., Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007).

18 *Hardy v. Riser*, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970) (“[Rule 35’s] purpose [is] to inform the court and the parties of the true facts as to the physical condition of the party claiming injury . . . [which] helps to further an important federal policy, i.e., securing ‘the just, speedy and inexpensive determination of every action.’”).

19 *E.N. v. Susquehanna Twp. Sch. Dist.*, 1:09-CV-1727, 2011 WL 2600870, at *4 (M.D. Pa. June 29, 2011) (“*E.N. P*”) (requiring defendant produce its consulting examiner’s Rule 35 opinions even if “such testimony is either unhelpful or harmful” to its case); *Weir v. Simmons*, 233 F. Supp. 657, 659–60 (D. Neb. 1964) (requiring plaintiff produce its consulting examiner’s Rule 35 opinions “be they favorable or detrimental to the plaintiff’s claim”).

20 *Lehan v. Ambassador Programs, Inc.*, 190 F.R.D. 670, 672 (E.D. Wash. 2000) (“An additional benefit is the possibility that the Rule 35 examiner will agree with the

Accordingly, even where the defendant designates the examining physician as a consulting expert, any report the examiner prepares must be produced “on request.”²¹ However, while Rule 35 requires the consulting examiner’s report be delivered if requested, it does not, as Rule 26(a)(2) does for testifying experts, expressly require a report be prepared in the first instance.²² Indeed, in cases where the physician’s exam merely confirms plaintiffs’ alleged injuries, paying the examiner to prepare a report is an unnecessary cost. In that event, the defendant may direct its consulting examiner not to bother preparing a report.²³ The defendant cannot, how-

opinion of the examined party’s experts or treating physicians thereby increasing the potential for settlement of the case.”).

21 *Shulin v. Werner Enters., Inc.*, 1:15CV95, 2017 WL 10379220, at *1–2 (N.D. W. Va. Jan. 9, 2017) (Rule 26(b)(4)(D)’s consultative privilege does not apply to Rule 35 IME reports); *E.N. v. Susquehanna Twp. Sch. Dist.*, 1:09-CV-1727, 2011 WL 3163186, at *3 (M.D. Pa. July 26, 2011) (“*E.N. IP*”) (requiring defendant to produce consulting examiner report); *DeCristo ex rel. DeCristo v. Sw. Motor Transp., Inc.*, CIV. A. No. 89–6080, 1990 WL 156457, at *2 (E.D. Pa. Oct. 12, 1990) (same).

22 Rule 35(b)(5)’s language providing that if a physician fails or refuses to deliver a report the court may exclude his testimony if offered at trial necessarily contemplates situations where the examiner does not prepare a report. FED. R. CIV. P. 35(b)(5). *See also* *Delgado v. GGNCS Grand Island Lakeview LLC*, 4:15CV3124, 2016 WL 5339535, at *2 (D. Neb. Sept. 23, 2016) (finding that Rule 35 does not “require that a non-testifying expert create an expert report” and that defendant must therefore only “provide a copy of any written report concerning the examination to Plaintiff, if such a report exists”); *Waggoner v. Ohio Cent. R.R.*, 242 F.R.D. 413, 414 (S.D. Ohio 2007) (“[A] Rule 35 report is to be prepared and issued only if requested by the party who is examined. To interpret Rule 26(a)(2) to require a mandatory issuance of the report would contradict the plain language of Rule 35.”); *Kerns v. Consol. Rail Corp.*, 90 F.R.D. 134, 139 (E.D. Pa. 1981) (court would have required consulting examiner to prepare and deliver a report had plaintiff requested it).

23 *Salvatore v. Am. Cyanamid Co.*, 94 F.R.D. 156, 158 (D.R.I. 1982) (speculating that “defendant received an oral report from [the consulting examiner], decided it did

ever, through its own unilateral choice, deprive plaintiffs of their right under Rule 35 to discover the defense examiner's opinions. Plaintiffs who want a report can therefore still get one through a court order directing the defense examiner to prepare a report at plaintiffs' expense.²⁴

C. Plaintiffs' Reciprocal Waiver of Privilege under Rule 35

In those instances where the defendant does have its examiner prepare a report, that report must be produced to plaintiffs only "on request,"²⁵ which has a narrow meaning in the context of Rule 35. The Rule 35 exception to Rule 26(b)(4)(D)'s consultative privilege only applies to exams conducted pursuant to motion or agreement of the parties,²⁶ so plaintiffs ordinarily owe no duty to produce reports prepared by consulting examiners they separately retained. However, under Rule 35, plaintiffs who request the defense examiner's report or take the defense examiner's deposition automatically waive any privilege they have as to their own consulting examiners.²⁷ Such plaintiffs must then produce all of their own examiner's reports and testimony even if that information is unfavorable to

not like what it heard, and therefore told [the consulting examiner] not to bother preparing a report").

24 *Id.* at 158–59. *But see* *Novak v. Capital Mgmt. & Dev. Corp.*, 01-00039(HHK/JMF), 2004 U.S. Dist. LEXIS 32525, at *6 (D.D.C. Feb. 26, 2004) ("While the rule does not specifically indicate that a report must be prepared, the requirement that it be delivered, once prepared, has to be read to imply that the party who demanded the examination must cause it to be prepared. Accordingly, I will order its preparation at defendants' expense.").

25 FED. R. CIV. P. 35(b)(1).

26 FED. R. CIV. P. 35(a)(2).

27 FED. R. CIV. P. 35(b)(4).

their claims and they do not intend to call the examiners to testify at trial.²⁸ In those cases where the exam confirms plaintiffs' alleged injuries and a report itself would seem to have little intrinsic value, it may still benefit the defendant to have a report of its own prepared as its existence may prompt a request from plaintiffs, thereby triggering plaintiffs' Rule 35 reciprocal waiver obligations. But by simply not requesting the defendant's report, plaintiffs can shield any unfavorable consulting examiner opinions from discovery.²⁹

A defendant cannot obtain plaintiffs' otherwise privileged consulting examiner reports merely by delivering its own report unsolicited.³⁰ There is no reciprocal waiver where plaintiffs have made no request but are given a copy of the examiner's report by the defendant voluntarily.³¹ Accordingly, to ensure it receives the reciprocal waiver it is entitled to under Rule 35, the defendant must provide its IME report only in response to a *specific* request made by plaintiffs *after* the exam.³² If the defendant never receives such a specific request, it has no duty to turn the report over. For example, the defendant is not obligated to supplement its discovery responses and produce its consulting physician's IME report in response to plaintiffs'

28 *Weir v. Simmons*, 233 F. Supp. 657, 659–60 (D. Neb. 1964).

29 *Garner v. Ford Motor Co.*, 61 F.R.D. 22, 24 (D. Alaska 1973) (“Admittedly, the procedure under Rule 35 is potentially ineffective in the event plaintiffs do not request a copy of the examination ordered by defendants, since then defendants would not be entitled to receive copies of all reports of any prior or subsequent medical examination of plaintiffs.”).

30 1 DISCOVERY PROCEEDINGS IN FEDERAL COURT § 18:13 REPORT OF EXAMINER—WAIVER OF PRIVILEGE (3d ed. 2021).

31 *Sher v. De Haven*, 199 F.2d 777, 781 (D.C. Cir. 1952); *Hardy v. Riser*, 309 F. Supp. 1234, 1236 (N.D. Miss. 1970).

32 *See, e.g.*, MICHAEL O'CONNOR, O'CONNOR'S FEDERAL CIVIL FORMS Form 6J:4 (2019 ed.).

standard request for production of “all expert reports” served at the outset of the case, since the request did not contemplate waiving consultative privilege as it was made prior to the defendant even seeking the IME.

II. DISCOVERABLE IME MATERIALS UNDER RULE 35

A. IME Expert Reports

When plaintiffs do make a specific request for the IME report, the defendant must provide it right away. Since the medical examination of the plaintiffs is a factual investigation to collect data upon which to base an expert opinion, it must be conducted prior to the fact discovery cutoff date just like a product inspection or site visit.³³ Given this similarity to other discovery fact-gathering tools, and based on Rule 35’s purported silence as to deadlines,³⁴ some courts have concluded that IME reports are

33 *Garayoa v. Miami-Dade County*, 16-CIV-20213, 2017 WL 2880094, at *4 (S.D. Fla. July 6, 2017) (“a Rule 35 examination is no different than any other discovery tool that a party uses in obtaining evidence that a testifying expert could use in forming an opinion and creating an expert report.”); *Valiavicharska v. Celaya*, CV 10–4847, 2011 WL 6370059 at *11 (N.D. Cal. Dec. 19, 2011) (denying Rule 35 request because defendants “did not seek the IME of Plaintiff’s hand . . . before the discovery cut-off”); *In re Harper*, 15-157-JWD-RLB, 2016 WL 7031883, at *2 (M.D. La. Dec. 1, 2016) (“As a discovery tool, Rule 35 examinations are subject to the Court’s discovery deadlines.”).

34 *Rowland v. Paris Las Vegas*, 13CV2630-GPC (DHB), 2015 WL 4662032, at *3 (S.D. Cal. Aug. 6, 2015) (“Rule 35 is silent as to the deadline for conducting an IME”); *Diaz v. Con-Way Truckload, Inc.*, 279 F.R.D. 412, 416 (S.D. Tex. 2012) (“Rule 35 fails to provide a deadline by which a Rule 35 examination must be conducted or when a report from such an examination must be provided.”); *Bush v. Pioneer Human Servs.*, No. C09-0518 RSM, 2010 WL 324432, at *5 (W.D. Wash. Jan. 21, 2010) (“There is no specific deadline for Rule 35 examinations or reports.”).

subject to Rule 26(a)(2)'s timing requirements,³⁵ which provide that expert reports need not be produced until an extended period after the close of fact discovery.³⁶

These courts ignore the plain text and purpose of Rule 35. Rule 35 is far from silent on timing; to the contrary, it expressly states that IME reports must be produced “on request,” i.e. immediately. Moreover, applying Rule 26(a)(2)'s delayed disclosure deadline to IME reports undermines Rule 35's goal of quickly resolving the case by giving both sides equal access to information about the plaintiff's medical condition.³⁷ If the report reveals information damaging or helpful to plaintiffs' case, it may cause the parties to settle well before the expert disclosure deadline. That being the case, the defendant must produce its consulting examiner's report immediately when requested or otherwise risk the imposition of sanctions. The only sanction specifically set forth in Rule 35 for failing to deliver a requested report is excluding the defense examiner's testimony at trial.³⁸ That is no sanction at all when the reason the defendant withholds it is that its opinions are unfavorable to the defendant's position.³⁹ Courts

35 *Diaz*, 279 F.R.D. at 419; *Shumaker v. West*, 196 F.R.D. 454, 457 (S.D. W.Va. 2000); *Lopez v. City of Imperial*, No. 13-0597-BEN(WVG), 2014 U.S. Dist. LEXIS 7291, at *5 (S.D. Cal. Jan. 21, 2014).

36 *Henry v. Quicken Loans Inc.*, No. 04-40346, 2008 WL 4735228, at *6 (E.D. Mich. Oct. 15, 2008).

37 *Hardy v. Riser*, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970).

38 FED. R. CIV. P. 35(b)(5).

39 *E.N. v. Susquehanna Twp. Sch. Dist.*, 1:09-CV-1727, 2011 WL 2600870, at *4 (M.D. Pa. June 29, 2011) (“*E.N. P*”).

therefore retain wide discretion to fashion sanctions beyond those provided in Rule 35,⁴⁰ including awarding attorneys' fees to plaintiffs under Rule 37 for having to compel the defendant to hand over its report.⁴¹

B. IME Expert Interrogatories and Depositions

Plaintiffs can also discover the opinions of the defendant's consulting examiner by interrogatories or deposition. While some courts have construed Rule 35 narrowly as requiring production of nothing but the report,⁴² the better-considered view holds that the consulting examiner is subject to broader discovery. First, the explicit text of Rule 26(b)(4)(D) states that although "[o]rdinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by [a consulting] expert," it "may do so" – i.e. it *may by interrogatories or deposition* discover facts known or opinions held by the consulting examiner – "as provided in Rule 35(b)."⁴³ Rule 35(b)(4), in turn, expressly provides that "[b]y requesting and obtaining the examiner's report, *or by deposing the examiner*, [plaintiff] waives any privilege" to withholding its own reports on the same injuries.⁴⁴

40 *Id.* (citing 7 MOORE'S FEDERAL PRACTICE §35.12[4] (3d.)).

41 *DeCristo ex rel. DeCristo v. Sw. Motor Transp., Inc.*, CIV. A. No. 89–6080, 1990 WL 156457, at *2 (E.D. Pa. Oct. 12, 1990)

42 *Spencer v. Huron County*, 15-CV-12209, 2016 WL 4578102, at *5 (E.D. Mich. Sept. 2, 2016); *Adams v. Rush Trucking Corp.*, 3:06-CV-65, 2007 WL 9729119, at *4 (N.D. W. Va. Jan. 8, 2007); *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236, 246 (N.D. Iowa 1996); *Brown v. Ringstad*, 142 F.R.D. 461, 465 (S.D. Iowa 1992).

43 *Castillo v. W. Beef, Inc.*, 04 CV 4967 (NGG) (ETB), 2005 WL 3501880, at *2 (E.D.N.Y. Dec. 21, 2005); *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 632 (D. Kan. 1999).

44 FED. R. CIV. P. 35(b)(4) (emphasis supplied).

Lastly, subdivision (b)(6) “does not preclude [the defendant from] obtaining an examiner’s report or deposing an examiner under other rules.”⁴⁵ Rule 35 thus clearly permits taking the defense examiner’s deposition, as it conditions plaintiffs’ reciprocal waiver on either plaintiffs’ requesting the defense examiner’s report or taking the defense examiner’s deposition. Rule 35 further provides that if plaintiffs do neither and, thus, never trigger their reciprocal waiver, the defendant can secure plaintiffs’ unprivileged⁴⁶ examiner’s reports and depositions under “other rules;” namely, a request for production of documents under Rule 34⁴⁷ and subpoena for deposition under Rule 30.

The scope of the defense examiner’s deposition is subject to no constraints beyond the broad and liberal parameters delineated by Rule 26(b), which permits interrogation into any matter relevant to a party’s claim or defense that is reasonably calculated to lead to the discovery of admissible evidence.⁴⁸ If a report has been prepared, the examiner may obviously be deposed about that report and the findings, diagnoses, and conclusions therein. Plaintiffs may also inquire into matters outside the report. They may discover all facts known or opinions held by the consulting examiner

45 *Id.*

46 FED. R. CIV. P. 35(b)(3) advisory committee’s note to 1970 amendment (“But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report.”).

47 *Buffington v. Wood*, 351 F.2d 292, 297, 297 n.15 (3d Cir. 1965) (“Merely because he has been able to medically examine his adversary, that adversary’s decision not to request a copy of the report of his examination under Rule 35(b) (1) should not necessarily bar discovery, under Rule 34, or otherwise, by the defending party, of his adversary’s personal medical reports” where the adversary does not argue “that the contents of the reports contained matter in some way privileged.”).

48 FED. R. CIV. P. 26(b)(1); *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947).

relevant to the subject matter of the litigation, regardless of whether they are set forth in a report or not, and regardless of whether a report was prepared at all. Because the opinions of the consulting examiner, like those of the testifying expert, are discoverable and subject to deposition, so too are the underlying facts, data,⁴⁹ and assumptions communicated to the examiner by defense counsel⁵⁰ that the examiner considered in forming those opinions. Further, the consulting examiner's communications with third parties,⁵¹ as well as any notes or other writings, must likewise be produced.⁵² As with testifying experts, plaintiffs are entitled to these materials so they can effectively explore and challenge the consulting examiner's opinions.⁵³

49 *Nunn v. Show Fountains, Inc.*, No. CIV-05-1161, 2006 WL 8436337, at *4 (W.D. Okla. Dec. 4, 2006) (compelling production of the defense consulting examiner's raw testing data resulting from the exam).

50 FED. R. CIV. P. 26(b)(4)(C).

51 FED. R. CIV. P. 26(b)(4) advisory committee's note to 2010 amendment; *Pralinsky v. Mut. of Omaha Ins. Co.*, No. 8:09CV8, 2009 WL 4738199, at *1 (D. Neb. Dec. 4, 2009) (compelling production of recorded oral communications related to plaintiff contemporaneously with delivery of Rule 35 report).

52 *Harrison v. Newman*, No. 2:16-2919-RMG, 2017 WL 4277632, at *2 (D.S.C. Sept. 26, 2017); *Nunn*, 2006 WL 8436337, at *4; *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1192 (11th Cir. 2013).

53 *Hinchee*, 741 F.3d at 1192 (A testifying expert's notes and communications with non-attorneys are discoverable because "the opposing side must have the opportunity to challenge the opinions of a testifying expert, including how and why the expert formed a particular opinion."); *Harrison*, 2017 WL 4277632, at *2 (Effective deposition and cross-examination "necessarily requires production of the Rule 35 examiner's examination notes, list of materials relied upon, prior testimony, time records related to the examination, *etc.*").

C. IME Expert Draft Reports and Communications with Counsel

Most significantly, unlike testifying experts, the consulting examiner's communications with defense counsel and draft reports are not protected from discovery.⁵⁴ The few courts that have addressed this issue have reached inconsistent and even directly contradictory results and have done so in a largely conclusory fashion. One court ruled that the examiner's drafts were not protected because he was a consulting and not a testifying expert;⁵⁵ another found that because the examiner *was* a consulting expert his drafts *were* protected unless or until he was designated a testifying expert;⁵⁶ a third held that the examiner's drafts were protected precisely *because* he was a testifying expert.⁵⁷ Other courts have found drafts discoverable irrespective of whether the examiner testifies or not.⁵⁸ While their

54 *Harrison*, 2017 WL 4277632, at *2 (“The plain language of Rule 35(b) does not limit disclosure to only final reports submitted by the examiners and makes no distinction between draft reports and final reports.”) (quoting *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2015 WL 1414524, at *2 (D.S.C. Mar. 26, 2015)); *E.N. v. Susquehanna Twp. Sch. Dist.*, 1:09-CV-1727, 2011 WL 3163186, at *3 (M.D. Pa. July 26, 2011) (“*E.N. II*”).

55 *E.N. II*, 2011 WL 3163186, at *3 (finding that Rule 26(b)(4)(B) did not protect examiner's draft reports because he was a consulting expert).

56 *Botkin v. Tokio Marine & Nichido Fire Ins. Co.*, No. 12-95-DLB-CJS, 2013 WL 12384663, at *3 (E.D. Ky. Apr. 9, 2013) (“Thus, while the Court will not order the production of notes, test results or draft reports at this time, it will order that Dr. Cooley preserve such documentation in the event he is identified as a trial expert.”).

57 *Bryant v. Dillon Real Estate Co.*, No. 18-CV-00479-PAB-MEH, 2019 WL 3935174, at *3 (D. Colo. Aug. 20, 2019) (finding the examiner's drafts not discoverable because he was a testifying expert under Rule 26(b)(3)).

58 *Harrison*, 2017 WL 4277632, at *1–2; *Pralinsky v. Mut. of Omaha Ins. Co.*, No. 8:09CV8, 2009 WL 4738199, at *1 (D. Neb. Dec. 4, 2009).

rationale is equally unclear, these latter decisions reach the right result given the purpose of the typical expert versus that of the examiner.

Rule 26(b)(4) shields testifying experts' communications and draft reports from discovery because they reflect a collaborative effort between counsel and the expert to organize, marshal, and selectively present the expert's opinions to benefit one side, a process which necessarily reveals attorney work product.⁵⁹ That concern is inapplicable to Rule 35 reports, which are to be nonpartisan, objective documents⁶⁰ prepared independently by the examiner⁶¹ without edit by defense counsel.⁶² Because work product is not implicated, there is no basis for protecting the defense examiner's drafts and communications from discovery.⁶³ By extension, once plaintiffs request this information, they trigger Rule 35's reciprocal

59 *Wenk v. O'Reilly*, No. 12–CV–474, 2014 WL 1121920, at *4 (S.D. Ohio Mar. 20, 2014).

60 *Shirsat v. Mut. Pharm. Co.*, 169 F.R.D. 68, 71 (E.D. Pa. 1996) (not permitting observer in Rule 35 exam as it “interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry.”).

61 *Ewing v. Ayres Corp.*, 129 F.R.D. 137, 138 (N.D. Miss. 1989) (“The purpose of a Rule 35 examination is to secure an *independent* physical or mental examination of a party.”) (emphasis in original).

62 *Chastain v. Evennou*, 35 F.R.D. 350, 353–54 (D. Utah 1964) (“Counsel of course should not edit reports or suggest their being rewritten to correspond with partisan ideas or desires. This . . . would be inconsistent with the spirit of Rule 35 . . .”).

63 *Harrison*, 2017 WL 4277632, at *2 (“The Rule 35(b) exception plainly applies to the Rule 26(b)(4)(D) trial preparation protection Defendant asserts. . . . Defendant waived work product protections under Rule 26(b)(3) with regard to Dr. Pritchard's opinions when Defendant successfully moved for a Rule 35 examination conducted by Dr. Pritchard.”).

waiver and must, to put both sides on equal footing with regard to plaintiffs' medical status,⁶⁴ produce drafts and communications with their own examiners.⁶⁵

D. IME Expert Trial Testimony

In addition to being discoverable, one side may subpoena the opposing examiner to testify at trial even where its adversary does not designate them as a testifying expert.⁶⁶ While several courts have analyzed this issue under Rule 26(b)(4)(D) and held that its consultative privilege precludes compelling the testimony of opposing examiners except upon a showing of “exceptional circumstances,”⁶⁷ the correct standard is the balancing test set forth in Federal Rule of Evidence 403.⁶⁸ Rule 26(b)(4)(D) only governs

64 *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 25 (D. Conn. 1994) (Rule 35 serves to “preserve[] the equal footing of the parties to evaluate the plaintiff’s mental state. . . .”) (quoting *Tomlin v. Holecek*, 150 F.R.D. 628, 633 (D. Minn. 1993)); *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D. Cal. 1995) (“One of the purposes of Rule 35 is to level the playing field in cases where physical or mental condition is at issue. . . . A plaintiff has ample opportunity for psychiatric or mental examination by his/her own practitioner or forensic expert.”) (internal quotation marks omitted).

65 *Weir v. Simmons*, 233 F. Supp. 657, 659–60 (D. Neb. 1964) (By requesting defendant’s report, plaintiff triggered Rule 35’s reciprocal waiver and was therefore required to produce all his consulting examiner reports, including two reports he did not intend to make use of in the case.).

66 *Fitzpatrick v. Holiday Inns, Inc.*, 507 F. Supp. 979, 980 (E.D. Pa. 1981).

67 *Lehan v. Ambassador Programs, Inc.*, 190 F.R.D. 670, 672 (E.D. Wash. 2000); *Blumhorst v. Pierce Mfg., Inc.*, No. 4:10-CV-00573-REB, 2013 WL 12138591, at *2 (D. Idaho Feb. 14, 2013).

68 *House v. Combined Ins. Co.*, 168 F.R.D. 236, 246 (N.D. Iowa 1996); *Morris v. Mitsubishi Motors N. Am., Inc.*, No. CV-08-0396-RMP, 2011 WL 13228438, at *3 (E.D. Wash. Mar. 28, 2011); *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 461 (S.D.N.Y. 1995).

the *discoverability* of consulting expert evidence;⁶⁹ it has no role in deciding whether any consulting expert evidence actually discovered is then later admissible at trial.⁷⁰ Furthermore, it is incongruous to require “exceptional circumstances” to compel an opposing examiner to testify at trial when that same testimony is available by deposition as of right pursuant to Rule 35.⁷¹ Instead, then, the question should be governed by Rule 403 and whether the probative value of the testimony outweighs its potential prejudice.⁷² In cases where both sides’ examiners substantially agree, the prejudice in allowing one party to piggyback off the other’s effort and expense in preparing for trial outweighs what little value may be offered by the examiners’ cumulative testimony.⁷³ But when the opposing examiner possesses unique evidence that advances arriving at the truth of the matter,⁷⁴ they may be called, provided their customary fees are paid⁷⁵ and the jury is not informed of how they first became involved in the case.⁷⁶ The fact that the defendant retained the examiner is inherently prejudicial, as jurors might assume they are only hearing about it from plaintiffs because the defendant suppressed evidence it had an obligation to offer.⁷⁷

69 *Crowe v. Nivison*, 145 F.R.D. 657, 657–58 (D. Md. 1993).

70 *Morris*, 2011 WL 13228438, at *2.

71 *Id.*

72 *See* FED. R. EVID. 403.

73 *Rubel*, 160 F.R.D. at 461–62.

74 *Crowe*, 145 F.R.D. at 658.

75 *Fitzpatrick v. Holiday Inns, Inc.*, 507 F. Supp. 979, 980 (E.D. Pa. 1981).

76 *House v. Combined Ins. Co.*, 168 F.R.D. 236, 248 (N.D. Iowa 1996); *Morris*, 2011 WL 13228438 at *3; *Peterson v. Willie*, 81 F.3d 1033, 1038 (11th Cir. 1996).

77 *House*, 168 F.R.D. at 243.

III. CONCLUSION: PROCEED WITH CAUTION

Conducting an IME does not, in itself, bring Rule 35 into effect. Instead, Rule 35 only activates if plaintiffs subsequently seek discovery from the defendant related to that IME which, in turn, automatically triggers plaintiffs' reciprocal waiver of any privileges relating to their own separately obtained IME materials.⁷⁸ At that point, according to the case law, examiners on both sides then cease being partisan experts whose purpose is to advocate within reasonable grounds on behalf of the side that employed them and become, in effect, independent, non-adversarial "officers of the court"⁷⁹ whose roles are to inform both sides and the court of the true facts of plaintiffs' alleged injuries so as to facilitate the "just, speedy, and inexpensive determination" of the case.⁸⁰ Because of this independent role,⁸¹ the work product concerns undergirding Rule 26's discovery

78 FED. R. CIV. P. 35(b)(3) advisory committee's note to 1970 amendment ("To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor.").

79 *Dziwanoski v. Ocean Carriers Corp.*, 26 F.R.D. 595, 596–97 (D. Md. 1960) ("The physician is an 'officer of the Court' performing a non-adversary duty."); *Warrick v. Brode*, 46 F.R.D. 427, 428 (D. Del. 1969) ("The examining doctor is, in effect, an 'officer of the court' performing a non-adversary duty.").

80 *Hardy v. Riser*, 309 F. Supp. 1234, 1241 (N.D. Miss. 1970) ("[Rule 35's] purpose [is] to inform the court and the parties of the true facts as to the physical condition of the party claiming injury . . . [which] helps to further an important federal policy, i.e., securing 'the just, speedy and inexpensive determination of every action.'").

81 Notably, some courts and commentators have posited that it is unrealistic and artificial to consider examiners to be any more "independent" than any other paid expert, *McKisset v. Brentwood BWI One LLC*, No. WDQ-14-1159, 2015 WL 8041386, at *3 (D. Md. Dec. 4, 2015), as examiners too typically work exclusively for one side or the other, Christopher Robertson, *The Problem of Biased Experts, and Blinding as a Solution: A Response to Professor Gelbach*, 81 U. CHI. L. REV. DIALOGUE 61, 62 (2014), and often derive a substantial part, if not all, of their income from providing expert

privileges for consulting and testifying experts are not implicated for Rule 35 examiners, and there are no constraints on their discovery beyond those placed on all discovery; namely, that the discovery seek information reasonably calculated to lead to admissible relevant evidence.⁸²

Given the ramifications of this analysis and indeed, given how Rule 35 has been variously interpreted and applied, both sides must be circumspect when employing IME examiners. The defendant even more so, because Rule 35, once in motion, removes its ability to control events and exposes it to potentially greater negative consequences. Under the rules, plaintiffs can select as many examiners to perform as many IMEs as they wish⁸³ until they get the witness and opinion they prefer, and can then designate that examiner as a testifying expert, protecting drafts and communications containing work product from disclosure.⁸⁴ More importantly, plaintiffs possess sole discretion to shield any other IMEs they did *not* like from any discovery whatsoever by simply not requesting discovery from defendant's examiner, thereby never triggering Rule 35 and its reciprocal waiver of Rule 26(b)(4)(D)'s consultative privilege.⁸⁵ Waiver,

services, Stephen Kaneshiro, Comment, *Doctored Claims*, 52 ARIZ. ST. L.J. 667, 675–76 (2020); John C. McLaren, *Defense Medical Examinations: The Fallacy of Impartiality*, HAW. B.J. 6 (2000), all of which creates incentives and inherent bias in favor of the party that retained them. Hon. Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239, 268 (2015); Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 177 (2010). As this article is concerned only with how Rule 35 currently operates in practice, these policy concerns are beyond its scope.

82 *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

83 *Tomlin v. Holecek*, 150 F.R.D. 628, 632–33 (D. Minn. 1993).

84 This practice of using multiple experts to get the most favorable opinion has been referred to “expert mining.” Jonah B. Gelbach, *Expert Mining and Required Disclosure*, 81 U. CHI. L. REV. 131, 131 (2014).

85 *Weir v. Simmons*, 233 F. Supp. 657, 659–60 (D. Neb. 1964).

then, is the price of defendant's report,⁸⁶ and plaintiffs can *choose* not to pay it. The defendant, on the other hand, only has one shot at examining plaintiffs,⁸⁷ and no choice but to live with its results,⁸⁸ as its assertion of privilege over IME discovery is subject to plaintiffs' blanket override. Rule 35, in operation, therefore unfairly advantages plaintiffs over defendants and undermines its own purpose of equal access and full transparency regarding plaintiffs' medical condition by conferring upon plaintiffs sole authority to withhold their own IME materials but compel the defendant to disclose its IME materials.

Defense counsel must therefore vet prospective examiners as thoroughly as possible because once the IME starts, the defendant is stuck with them. As for plaintiffs, they should only request the defendant's IME materials when they are sure their own are airtight; once Rule 35 is invoked, there is nothing protecting any of this material from being discovered by the other side.

Counsel must accordingly be judicious in their communications with the examiner.⁸⁹ Matters discussed should be limited primarily to retention, compensation, and scheduling. Further, counsel should narrowly limit the scope of the examination and instruct the examiner to stay within those bounds. The first line of defense against having to disclose unfavorable opinions is to prevent them from being made in the first place by limiting the exam and report to only those areas counsel is confident will return

86 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 6.13.3 (Richard D. Friedman ed., 3d ed. 2021).

87 *Tomlin*, 150 F.R.D. at 632–33.

88 *Novak v. Capital Mgmt. & Dev. Corp.*, 01-00039 (HHK/JMF), 2004 WL 7334070, at *1 (D.D.C. Feb. 26, 2004).

89 JAY E. GRENIG & JEFFREY S. KINSLER, *HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE* § 10:12 (4th ed.).

favorable opinions. Moreover, in the event the examiner still develops opinions beyond that scope, it is better to put the burden on the opposing side to unearth them through deposition than to hand them over on a silver platter in a report or draft. In terms of documents, counsel can provide the examiner with copies of the pleadings, discovery responses, deposition transcripts, and plaintiff's medical records. These materials should be provided in full, not selectively, and without comment, and with opposing counsel carbon copied. Doing otherwise risks the appearance of trying to influence the examiner, damaging the credibility of both counsel and the examiner with the factfinder and, in egregious circumstances, may even warrant the imposition of sanctions.⁹⁰

90 Ewing v. Ayres Corp., 129 F.R.D. 137, 138 (N. D. Miss. 1989) (sanctioning plaintiff for sending, *ex parte*, another doctor's deposition transcript in apparent attempt to influence the examiner's opinion).

DATE: May 15, 2024

To: Court Rules and Procedures Committee

From: Civil Rules Subcommittee

RE: “Special Masters” Under Civil Rule 53.3

Issue

Judge Helen Halpert (Ret.) suggests that the terms “master” and/or “special master” as used in Washington Superior Court Civil Rule 53.3 are outdated and should be updated to reflect modern terminology. Additionally, she seeks clarification as to whether a lawyer who agrees to serve in the role of special master should be required to be an active member of the bar.

Deadline to Submit Comments

None. It does not appear that a formal request to revise CR 53.3 has been submitted to the Washington Supreme Court.

Brief Summary of CR 53.3

Washington Superior Court Civil Rule 53.3 was adopted in 1967 and last amended in 1993. The Rule empowers a court to appoint special masters to preside at depositions, adjudicate discovery disputes, or both. CR 53.3(a). *See also In Estate of Johnson*, 196 Wn.App. 1052, 2016 WL 6599648, at *15 (Div. 2, Nov. 8, 2016) (holding that superior court erred in appointing a special master when there were no depositions to take and no discovery disputes).

The appointment to special master may be made *sua sponte* or upon the request of any party for good cause. CR 53.3(a). The only qualification to be a special master is admission to practice law in the State of Washington. CR 53.3(b). There is no express requirement that the nominated special master be a lawyer on active status. Thus, a special master may be a lawyer on inactive status or retired. The Rule is silent about whether a lawyer who has had a prior disciplinary action or a pending disciplinary action may serve in the role of special master.

Brief Summary of Federal Rule of Civil Procedure 53.¹

Like CR 53.3, Federal Rule of Civil Procedure 53—which was initially drafted in 1938 and last revised in 2003—empowers federal courts to appoint special masters on an as-needed basis with the parties’ consent or by court order. However, the powers of special masters under FRCP 53 are much more expansive than the powers granted under CR 53.3. Federal special masters may, for instance, “regulate all proceedings,” “take all appropriate measures to perform the assigned duties

¹ A good overview of federal special masters is David Ferleger’s [“Special Masters under Rule 53: The ‘Exceptional’ Becomes ‘Commonplace’”](#) (2007).

fairly and efficiently,” and “exercise the appointing court’s power to compel, take, and record evidence.” FRCP 53(c).

Also note that federal judges “may designate a magistrate judge to serve as a *special master* in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure. . .” 28 U.S.C §636 (italics added).

Similar to CR 53.3, there is no requirement that the lawyer serving as special master be a lawyer on active status or may be excluded due to prior disciplinary action. *See* FRCP 53(a)(2).

Unlike CR 53.3, a federal court may not appoint a special master until after the special master has filed an affidavit disclosing whether there are any grounds for disqualification under Fed. R. Civ. P. 53(b)(3)(B). While no affidavit is required under CR 53.3, it is undisputed that a lawyer or judge cannot serve as special master if they have a relationship to the parties, counsel, or court that would require disqualification.

Analyses and Conclusions

The Civil Rules Subcommittee recognizes that Washington courts have used the terms “special discovery master” or “discovery special master.” *See, e.g., Rhodes v. Barnett & Associates, P.S.*, 13 Wn.App.3d 1001, 2020 WL 1814945, at *3 (Div. 3, Apr. 9, 2020); *Bellevue Farm Owners Assoc. v. Stevens*, 198 Wn.App. 464, 471, 394 P.3d 1019 (Div. 1, 2017); *Steel v. Philadelphia Indemnity Ins. Co.*, 195 Wn.App. 811, 819-821, 381 P.3d 111 (Div. 2, 2016); *Public Utility Dist. No. 1 of Klickitat County v. Walbrook Ins. Co. Ltd.*, 115 Wn.2d 339, 343, 797 P.2d 504 (1990).

However, the Civil Rules Subcommittee declines to take a position that a terminology update to Rule 53.5 is necessary since the role of special masters as set forth in Rule 53.5 is limited to discovery matters only. FRCP 53 and federal law utilize the term “master” or “special master,” and there is no indication that this is an “outdated” term. Case law research has not shown that these terms are improper or should be updated.

As to the qualifications to serve as special master, the Civil Rules Subcommittee does not take a position in revising CR 53.3 to limit lawyers on active status to serve in this role. The Civil Rules Subcommittee believes that lawyers and judges who are retired or on inactive or *pro bono* status should be allowed to serve in the role of special masters. In fact, the General Rules contain exceptions and exclusions to the practice of law, which includes “serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.” GR 24(b)(4). The special master’s role in resolving discovery issues is much like an arbitrator or facilitator.

Lawyers and judges who are retired or on inactive or *pro bono* status may have years of experience resolving and adjudicating discovery disputes. If they are chosen to serve as special masters, their wisdom will be valuable to the parties and the court. *See, e.g., Grider v. Quinn*, 21 Wn.App.2d 1009, 2022 WL 600234, at *9 (Div. 3, Mar. 1, 2022) (noting that trial court appointed a retired judge to serve as special master); *Cherberg v. Fid. Nat’l Title Ins. Co.*, No. 16-2-28551-1 SEA, 2019 Wash. Super. LEXIS 12287, at *5 (Dec. 16, 2019) (appointing former judge to serve as special discovery master); *West v. Port of Tacoma*, 179 Wn. App. 1034, 2014 WL 689739, at *2

(Div. 2, Feb. 20, 2014) (same). Limiting special masters only to lawyers on active status may not benefit the parties, the court, or the public.

Finally, with respect to prior disciplinary action, the Civil Rules Subcommittee does not believe that this presents a significant issue that warrants revisions to the current Rule. Before appointment to special master, the parties and the court may review the nominee's disciplinary history and directly inquire with the nominee whether there is any past or pending disciplinary action. Nominees who agree to serve as special master must still comply with the Washington Rules of Professional Conduct, including but not limited to RPC 1.12 (former judge or other third-party neutral), RPC 2.4 (lawyers serving as third-party neutral), RPC 3.3 (candor to the tribunal), and RPC 8.4 (misconduct).

For the aforementioned reasons, the Civil Rules Subcommittee does not take a position in revising CR 53.3.